owners of No. 11, and that Bumgardner, to whom No. 11 had been conveyed, was the exclusive owner of the iron ore under No. 6 in fee-simple, and so dissolved the injunction. And in the Court of Appeals the decision of the Circuit Court was affirmed as to the nature of the mineral right reserved by the trustees on the sale of No. 6 to Lilly—that it was exclusive and unlimited, and, therefore, amounted to a corporeal hereditament; but it was held that, being corporeal, it did not pass to Bumgardner by the deed to him of that part of No. 11, and so the title to the minerals at the institution of the suit was still in the trustees. Hence, at that time Bumgardner was a trespasser upon the rights of Lee, not because Lee was the owner of the ore bank (which had been reserved on the grant to Lilly of No. 6), but because Bumgardner, not having title to the ore bank, had no right to trespass on No. 6 (the surface of which belonged to Lee); and that being a mere stranger, he could not justify his invasion of the soil of another by the outstanding rights of the original vendors (the trustees). But, after suit was brought, Bumgardner perfected his title by obtaining a conveyance of the ore banks under No. 6 from the surviving trustee (one of the vendors of No. 6); and it was held that while this title was procured after suit was brought, yet having been obtained without interference with the rights of Lee, it constituted a valid defence to his complaint against Bumgardner so far as digging the ore was concerned.

FRAUD WHEN MEANS OF KNOWLEDGE ARE AT HAND AND EQUALLY AVAILABLE TO SELLER AND BUYER.—Under these circumstances, it is said in the recent case of *Lake v. Tyree*, 90 Va. 719, that the buyer has no remedy by reason of the seller's false representations, but must abide the consequences of his own folly or carelessness. But this doctrine was not necessary to the decision of the case, as in the Court of Appeals the only statements by the seller that could be considered were of *opinion*, not fact, and on this ground the buyer was without remedy. The doctrine, however, is laid down in a number of American cases (see note to *Spitze v. Baltimore etc. R. Co.* 32 Am. St. R. 384); but there are authorities to the contrary, and it should receive further consideration befor it is accepted as the law of Virginia. In *Long v. Warren*, 68 N. Y. 426, cited in *Lake v. Tyree*, three of the seven judges dissented; and in *Cottrill v. Krum*, 100 Mo. 397 (S. C. 18 Am. St. Rep. 549), the doctrine was examined and rejected.

In Pollock on Torts (3d ed. 377), the English rule is thus laid down: "Yet another case is that the plaintiff has at hand the means of testing the defendant's statement, indicated by the defendant himself, or otherwise within the plaintiff's power, and either does not use them, or uses them in a partial and imperfect manner. Here it seems plausible at first sight to contend that a man who does not use obvious means of verifying the representations made to him does not deserve to be compensated for any loss he may incur by relying on them without inquiry. But the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant; and it is now settled law that one who chooses to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representations were not in fact relied on." And in Bigelow on Torts (Law Student's Series, 4th ed., p. 39), it is said: "It has sometimes been laid down that if the means of knowledge be equally open to both parties, the plaintiff, as a prudent man,

must be deemed to have availed himself of such means (or is not to be excused if he has not done so), and hence that in contemplation of law, he has not been deceived by the defendant's misrepresentation; the result being that, unless there was a warranty, no action can be maintained. . . . Some courts, however, have come to draw a distinction between means of knowledge *at hand* and general means of knowledge, in the case of misrepresentations, enforcing the doctrine in question when the means are at hand (and only in such cases). . . . Even this doctrine can hardly be considered acceptable generally in the light of most of the recent authorities as distinguished from the mere *dicta* of the books. It may be hard to believe that the plaintiff did not avail himself of means of knowledge directly at hand; but there is in principle, and on authority, only a probability of fact to be overcome, even in such a case. There is, by the better rule, no conclusion of law either that the plaintiff availed himself of the means, or that it was his duty to do so; the plaintiff may still show that he was misled by the defendant's representations." And see to the same effect Kerr on Fraud, p. 80; Bigelow on Fraud, 522–8, quoted in *Cottrill v. Krum, supra.*

In the analogous case of obtaining goods by false pretences it was once thought that if the person from whom the goods were obtained was negligent, or failed in ordinary prudence, the crime was not committed. But the tendency of the more recent authorities is to establish the rule that, whatever the pretence, if it was intended to defraud, and actually did defraud, the offence is committed. May's Crim. Law, sec. 113; *Bowen v. State*, 9 Baxter (Tenn.) 45 (S. C. 40 Am. Rep. 71, and extended note); *Barton v. People*, 135 Ill. 405 (S. C. 25 Am. St. Rep. 375, and note at p. 382).

DEMURRER TO A PLEA.—It is the practice in Virginia when the plaintiff demurs to the defendant's plea, and the demurrer is overruled, to permit the plaintiff to withdraw the demurrer, and reply to the plea by a traverse, or by way of confession and avoidance. 4 Min. Ins. (3d ed.) 1167; 1 Bart. Law Prac. (2d ed.) 455, 461–2. But it is hazardous for the plaintiff to demur to a plea, since if his demurrer is overruled, and he then obtains leave to withdraw it, and traverses the plea, or replies by way of confession and avoidance, he is considered to *waive* his demurrer, and cannot object to the legal sufficiency of the plea in the appellate court. The proper course for the plaintiff is, instead of demurring, to object to the reception of the plea, and move to reject it; and if his motion is overruled, he may except to the opinion of the court, and make his exception a part of the record by a bill of exceptions, and then reply to the plea in point of fact. In this way there is no waiver, and the plaintiff saves to himself in the appellate court the benefit of his objection to the plea. *Reed v. Hanna*, 3 Rand. 56; *Virginia Fire etc. Co. v. Buck*, 88 Va. 517. And see on the general subject, *Maggort v. Hansbarger*, 8 Leigh 532; *Reid v. Field*, 83 Va. 26; *Darracott v. Chesapeake etc. R. Co.*, 83 Va. 288; *Harris v. Norfolk etc. R. Co.*, 88 Va. 560; *Clearwater v. Meredith*, 1 Wall. 25.